Office-Supreme Court, U.S.
FILED
SEP 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-754

IN THE

Supreme Court of the United States

October Term, 1981

ANTHONY VALLONE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR PETITIONER

MICHAEL A. YOUNG
GOLDBERGER, FELDMAN,
DUBIN & YOUNG
Counsel for Petitioner
401 Broadway—Suite 306
New York, N.Y. 10013
(212) 431-9380

Questions Presented

1. Whether the provision of the Speedy Trial Act which guarantees a defendant at least thirty days between arraignment and trial to prepare his defense applies to arraignment on a superseding indictment charging the defendant with both new and materially revised crimes.

2. Whether a claim that "exigencies" prevented agents from obtaining a warrant before entering a private premises may properly be based on circumstances which were anticipated by the agents sufficiently in advance of their entry to enable them to foresee their need for a warrant and to make timely and proper application for one.

3. Whether the requirement of 18 U.S.C. § 2516(1) for Justice Department approval for a wiretap application is satisfied when that approval is given by someone who was never authorized by the current Attorney General to give such approval.

TABLE OF CONTENTS

PAGE

Questions Presented i

Opinions Below 1

Jurisdiction 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

1. The Decision Below Raises A Significant And Recurring Problem Concerning Whether The Provision Of The Speedy Trial Act Guaranteeing A Defendant At Least Thirty Days Between Arraignment And Trial To Prepare His Defense Applies To Arraignment On A Superseding Indictment Charging The Defendant With Both New And Materially Revised Crimes 4

2. The Court Should Grant A Writ of Certiorari To Resolve The Important Question Of Whether A Claim That "Exigencies" Prevented Agents From Obtaining A Warrant Before Entering A Private Premises May Properly Be Based On Circumstances Which Were Anticipated By The Agents Sufficiently In Advance Of Their Entry To Enable Them To Foresee Their Need For A Warrant And To Make Timely And Proper Application For One 8

3. A Writ Of Certiorari Should Be Granted To Determine Whether Justice Department Approval For A Wiretap, Issued By Someone Other Than The Current Attorney General And Who Was Never Authorized By The Current Attorney General To Give Such Approval, Satisfies The Requirements Of 18 U.S.C. § 2516(1) 14

PAGE

CONCLUSION 16

APPENDIX:

Opinion 1a

Order 11a

TABLE OF AUTHORITIES

Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) 7

Payton v. *New York*, — U.S. — (1980), 100 S. Ct. 1371 9

Silverman v. *United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 683, 5 L. Ed. 2d 734 9

United States v. *Campbell*, 581 F.2d 22 (2d Cir. 1978) 9

United States v. *Giordano*, 416 U.S. 505 (1974) 14

United States v. *Knight*, 443 F.2d 174 (6th Cir. 1971) 7

United States v. *Millican*, 414 F.2d 811 (5th Cir. 1969) 7

United States v. *Reed*, 572 F.2d 412, 423 (2d Cir., 1978), *cert. denied*, 439 U.S. 913 9

United States v. *Watson*, 423 U.S. 411 (1976) 13

Statutes:

18 U.S.C. § 2516(1) 14, 15

18 U.S.C. § 3161(c) 5, 6, 7

18 U.S.C. § 3165 6

Other Authorities:

Speedy Trial Plan for the Southern District of New York, Section 5(d)(2) 6, 7

Second Circuit's "Guidelines Under the Speedy Trial Act", Comment 31 (slip op. at 3157) 6, 7

S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Adm. News 2153 at 2185 14

IN THE

Supreme Court of the United States

October Term, 1981

No. .....

ANTHONY VALLONE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

The petitioner Anthony Vallone respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioner by the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p. 1a. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was May 22, 1981 which was also the date of entry. A timely petition for rehearing and rehearing en banc was filed by petitioner. That petition was denied on July 29, 1981. A copy of the order denying rehearing is set forth in the Appendix at 11a. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Statement of the Case

Petitioner Vallone was convicted, on the basis of his plea of guilty, to conspiracy and one substantive count of possession and distribution of heroin. His plea was entered on the basis of an assurance by the United States Attorney for the Southern District of New York and the District Judge that certain legal issues, including those raised in this petition, would be preserved for appeal.

A substantial portion of the evidence against petitioner Vallone was obtained from a wiretap which the Drug Enforcement Agency placed on the telephone of co-defendant Anthony Todisco. Petitioner Vallone was named as a target in the wiretap application and was intercepted while the wiretap was in operation. Consequently, the Courts below held that he had standing to challenge the legality of that tap.

The wiretap authorization statutes require that the Attorney General or a properly designated assistant approve each wiretap application before it is submitted to the district court. In this case, that approval was given by Philip Heymann, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice. Heymann had never been delegated the au-

thority to approve such applications by the current Attorney General, however. Rather, he relied for his authority on an order issued several years earlier by a former Attorney General. Even that order was suspect, since it authorized a position—Assistant Attorney General in charge of the Criminal Division—rather than any one individual, to grant approvals.

Other evidence against petitioner Vallone was seized during the warrantless entry by DEA agents into apartment 3C at 610 Waring Avenue, Bronx, New York on September 3, 1980. The agents insisted that the entry was necessary in order to arrest co-defendant Todisco, who was then inside the apartment, and that their failure to obtain a warrant was justified by the fact that any delay might enable Todisco to be alerted via the phone in the apartment of the arrests earlier that day of other alleged co-conspirators.

The trial court found that the Agents had possessed probable cause to arrest Todisco as early as August 7, 1980, almost four weeks before the arrest actually occurred. Moreover, the agents conceded that they anticipated in advance that they might arrest Todisco on September 3, 1980, when they planned to arrest as many conspirators as possible in the midst of a drug transaction. The possibility that Todisco would be alerted by phone of the arrest of other co-conspirators, contrary to being an unanticipated exigency, was actually an occurence which the agents both anticipated and actually desired. It was their expressed intent that such calls would reach Todisco over the wiretapped phone, thereby generating additional evidence. Consequently, the agents anticipated in advance both the possibility that such calls would be made and the possibility that Todisco would be inside a private premises to receive them. Nevertheless, the agents failed to secure a warrant authorizing them to enter such a premises to arrest him.

The initial indictment in this case was filed on September 11, 1980. Although the government indicated on several occasions during the next several months that it intended to file a superseding indictment, it did not actually do so until November 25, 1980, five days before the date which the trial judge had set for the commencement of trial. Although the superseding indictment contained completely new counts, as well as materially different allegations in support of the existing counts, the trial judge refused to grant any adjournment of trial in order to enable defense counsel to prepare to meet these new charges. The defendants thereupon pleaded guilty.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises A Significant And Recurring Problem Concerning Whether The Provision Of The Speedy Trial Act Guaranteeing A Defendant At Least Thirty Days Between Arraignment And Trial To Prepare His Defense Applies To Arraignment On A Superseding Indictment Charging The Defendant With Both New And Materially Revised Crimes.

The government indicated on several occasions during the fall of 1980 that it intended to file a superseding indictment in this case. It did not do so, however, until November 25, 1980, five days before the date which the trial judge had set for the commencement of trial.

Contrary to the Second Circuit's holding (slip op. at 3157), this superseding indictment was significantly different from its predecessor. Count VII was completely new, charging petitioner Vallone and others with a heroin transaction on June 11, 1980. This alleged transaction was nowhere mentioned in the original indictment,

either as a substantive crime or even as an overt act in the conspiracy charge.

The nature of the conspiracy charged in the superseding indictment was also substantially different from the conspiracy charged in the original indictment. Thus, in the "means" section of the original conspiracy charge, co-defendants Sferraza, Azmbuto and D'Angelo were alleged to have been wholesale suppliers of drugs to co-defendant Todisco's organization. In the superseding indictment, however, they were placed at the opposite end of the conspiratorial structure—as distributors of drugs to customers of the Todisco operation.

Moreover, the superseding indictment alleged almost twice as many overt acts as the original indictment. As with Count VII, these included events and dates which were not even mentioned in the original charges.

Faced with this last minute influx of new charges, petitioner and the other defendants moved for a thirty day adjournment of the commencement of trial, so as to investigate and prepare to defend themselves against these new allegations. The trial judge's denial of that motion (transcript at 809) was error.

First and foremost, petitioner was entitled to the thirty day adjournment under the Speedy Trial Act. After explaining that a trial must commence within seventy days from the date of the filing of the indictment or the defendant's first appearance on that indictment, 18 U.S.C. § 3161(c) contains the proviso that trial cannot commence less than thirty days after the defendant first appears on those charges.

The courts below held that the thirty day provision of §3161(c) was not applicable where the new charges were brought in a superseding indictment against a defendant

already charged with other crimes. The clear purpose of this section, however, was to give the defendant a reasonable time in which to prepare to defend himself against new charges. The need for this preparation period would obviously be the same regardless of whether those charges were the first being leveled against the defendant or were new charges being brought against a defendant who was already facing other charges.

In support of their position, the trial judge and the Second Circuit cited section 5(d)(2) of the Speedy Trial Plan for the Southern District of New York and/or the Second Circuit's "Guidelines Under the Speedy Trial Act", comment 31 (slip op. at 3157). Although these provisions require trial on a superseding indictment to commence within the time required for trial on the original indictment, they do not state that the thirty day adjournment requirement of 18 U.S.C. § 3161(c) is inapplicable in such situations. Nor could they properly have voided that section of the federal statute, either expressly or by implication. According to 18 U.S.C. § 3165, such plans must be "in accordance with this chapter" and "consistent with the time standards of this chapter." Clearly, then, plans promulgated by the district court or the Second Circuit cannot contravene or nullify a provision of the federal law.

Section five of the Southern District Plan and comment 31 of the Second Circuit's guidelines must therefore be interpreted in conjunction with the thirty day provision of 18 U.S.C. § 3161(c). Read together, they require that if the government intends to file a superseding indictment containing new charges, it must do so at least thirty days before the end of the period within which the case must be brought to trial under the Speedy Trial Act.

This conclusion is also mandated by the due process clause of the Fifth Amendment and the fair trial and effective assistance of counsel provisions of the Sixth Amendment. It is a firmly established principle of Constitutional law that defense counsel must be afforded "reasonable" time so as effectively to prepare for the defense of his client. See e.g. *Hart* v. *Coiner*, 483 F.2d 136 (4th Cir. 1973); *United States* v. *Knight*, 443 F.2d 174 (6th Cir. 1971); *United States* v. *Millican*, 414 F.2d 811 (5th Cir. 1969). Forcing a defendant to trial almost immediately after new charges have been brought against him clearly violates this right. In the present case, it may also have been a factor inducing the defendants to waive their trial rights and plead guilty.

The dilemma between the federal law and the district court or Second Circuit plan was of the government's own making. Had it brought the superseding indictment promptly, it could have afforded the defendants the thirty days to which they were entitled to prepare for trial on those charges under 18 U.S.C. § 3161(c) and still brought the case to trial within sixty days after the original indictment, as required by the Southern District plan. The government's failure to comply with these time requirements should not have led to a deprivation of petitioner's rights under the Speedy Trial Act. The trial judge's denial of petitioner's motion for a thirty day adjournment of trial was error which requires that his convictions be reversed.

2. The Court Should Grant A Writ Of Certiorari To Resolve The Important Question Of Whether A Claim That "Exigencies" Prevented Agents From Obtaining A Warrant Before Entering A Private Premises May Properly Be Based On Circumstances Which Were Anticipated By The Agents Sufficiently In Advance Of Their Entry To Enable Them To Foresee Their Need For A Warrant And To Make Timely And Proper Application For One.

On September 3, 1980, DEA agents entered a private residence—Apartment 3C at 610 Waring Avenue, Bronx, New York—for the purpose of arresting co-defendant Todisco. While there, the agents made observations which thereafter enabled them to obtain a search warrant, return to the apartment, and seize various evidence which the government intended to introduce against petitioner Vallone and others at trial.

The agents had possessed probable cause to arrest Todisco since August 7, 1980, almost four weeks before the actual arrest took place. Nevertheless, the agents failed to obtain either an arrest warrant or a search warrant before making their initial entry into apartment 3C to arrest that individual. Instead, they relied on circumstances existing at the moment of arrest which they claimed brought them within the "exigencies" exception to the warrant requirement. The record establishes, however, that all of those circumstances were anticipated sufficiently in advance of the arrest to enable the agents to apply for a warrant. Consequently, the courts below erred in holding that the agents were justified in failing to secure a warrant before making their initial entry.[1]

---

[1] The district court held that petitioner Vallone had sufficient interest in the apartment in question to have standing to challenge the legality of this warrantless entry.

In the recent landmark case of *Payton* v. *New York*, ——U.S.—— (1980), 100 S.Ct. 1371, this Court declared warrantless entries into private premises in order to effectuate felony arrests to be unconstitutional, absent exigent circumstances. In condemning this practice, the Court stated:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "(a)t the very core (of the Fourth Amendment) stands the right of a man to retreat into his home and there be free from unreasonable government intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. See also *United States* v. *Reed*, 572 F.2d 412, 423 (2nd Cir., 1978), *cert. denied*, 439 U.S. 913; *United States* v. *Campbell*, 581 F.2d 22 (2d Cir. 1978).

The Court left open, however, the question of the type of "exigent circumstances" that would justify a warrantless entry for the purpose of either arrest or search.

Even the trial court acknowledged that the present case posed a difficult question regarding the existence of exigent circumstances. If the warrant requirement as enunciated by this Court in the *Payton* decision is to have

any meaningful impact upon the actions of law enforcement agents, this Court must find that the courts below erred in concluding that the exigency requirement was satisfied in this case.

The trial court and the Second Circuit both held that the government agents had probable cause to arrest Todisco sufficiently far in advance of the actual arrest to obtain an arrest warrant. (transcript at 1355-56A). Although the Government thereafter delayed making any arrests in order to extend their investigation, it was clear, at least by September 2, 1980, that the investigation was coming to a conclusion.

It is at this juncture—September 2, 1980—that the reasonableness of the Government's actions must be closely scrutinized. On this critical day, the investigation team held a strategy meeting at which it was determined that a "buy and bust" operation would be conducted the following day, wherein the conspirators would be arrested in the course of a drug transaction. Consequently, as of September 2, 1980, twenty-four hours before those arrests took place, the agents not only had probable cause to arrest Todisco and the others, but had actually made the decision to effectuate those arrests on September 3rd. In fact, the agents were specifically briefed on September 2nd as to their responsibilities concerning such arrests. They even discussed the ramifications of the *Payton* decision, encompassing the warrant requirement and the issue of exigent circumstances. It was also decided that several assistant United States Attorneys were to be available on September 3rd for the immediate preparation of any search or arrest warrants which might be needed.

Thus, at least by September 2nd, 1980, the agents had every reason to believe that Todisco would be arrested on the following day, barring any unforeseen circumstances.

Moreover, the agents clearly anticipated that they might have to enter a private premises in order to effectuate arrest. In fact, the agents deliberately planned to arrest certain other conspirators before Todisco, in the hope that the arrests of his alleged co-conspirators would generate incriminating telephone calls to Todisco over his wiretapped phone. Consequently, the agents clearly foresaw the possibility that Todisco might have to be arrested inside a private premises, namely, his home, where that wiretapped phone was located. Nevertheless, those agents inexplicably failed to obtain an arrest warrant for Todisco.

Given the agents' discussion of the *Payton* decision at their meeting on September 2nd, the government cannot rationally argue that the agents acted in "good faith" ignorant of their duty to obtain an arrest warrant. Rather, it seems clear that the agents had made a calculated decision to ignore the *Payton* mandate, and to seek instead to manufacture the exigent circumstances which would authorize them to effectuate a warrantless arrest.

In any event, the exigent circumstances which the trial court found to have existed on the 3rd were all either already in existence or easily forseeable at the time of the September 2nd meeting. Thus, at the hearing below, case agent Corcoran testified that the exigencies necessitating a warrantless entry of Apartment 3C to arrest Todisco arose from the fact that if the agents had paused to obtain a warrant on September third, Todisco might have become aware of petitioner Vallone's arrest earlier that day and have escaped or destroyed evidence. In support of this speculation, Corcoran pointed to the fact that Vallone was arrested on his way back to the Waring Avenue apartment, in the midst of a six stage drug transaction. Since Vallone was clearly expected to

appear at the apartment, Corcoran speculated, his failure to do so would alert Todisco that something was wrong. Corcoran also speculated that since Vallone was arrested on a public street and since the Waring Avenue apartment had a phone, someone who had seen Vallone's arrest might phone Todisco to warn him.

These arguments are a classic example of manufactured exigencies. The agents were aware on September 2nd that the transaction on the 3rd would take place in six stages. Consequently, they were clearly aware in advance that if any arrest took place while that transaction would in progress, it might create a situation wherein the agents would not have the time to procure warrants to arrest the other suspects. Likewise, the agents were well aware on the 2nd that regardless of whether Todisco was at home, at work, or at the Waring Avenue apartment, he would be near a phone and therefore might be warned by phone once the arrests began to take place. In fact, they had expressed the hope that Todisco would receive precisely that type of telephone warning over the wiretapped line, thereby generating additional incriminating wiretap recordings. The agents likewise knew on September 2nd that the suspects might be armed, since this is invariably accepted as a truism by the courts in drug cases. And, of course, the agents knew on September 2nd that the suspects might try to escape or destroy evidence if the time were taken to procure a warrant on the 3rd.

Because these reputed exigent circumstances were already in existence or foreseeable on September 2nd, the Government should not be permitted to rely on them to justify the September 3rd warrantless entry to arrest. Rather, the fact that these so-called exigent circumstances were known to the agents on September 2nd made it mandatory that they secure the required arrest warrant in advance of the planned arrest. Certainly, it would

have presented no obstacle to their investigation if such a warrant had been obtained. An arrest warrant, unlike a search warrant, will continue to be valid for an indefinite time since once probable cause to arrest exists, it will exist into the future if no intervening exculpatory facts are uncovered. *United States* v. *Watson*, 423 U.S. 411 (1976).

Todisco was under constant surveillance on September 3rd. The agents had every opportunity of effecting his arrest on the street, as they did with Vallone and Acosta. In this context, the fact that the agents deliberately delayed taking such aciton and chose instead to make the arrest inside Apartment 3C at 610 Waring Avenue suggests that they were using the arrest in that locale as a pretext to gain access to that apartment.

Petitioner is not arguing, as the Second Circuit suggested (slip op. at 3154), that Agents must arrest someone as soon as they have probable cause to do so. What petitioner does maintain, however, is that where Agents contemplate the possibility of arresting someone inside a private dwelling and possess probable cause for that arrest sufficiently far in advance of that contemplated arrest to obtain an arrest warrant, they are required by the Fourth Amendment to do so.

To permit the Government in such circumstances to forego obtaining a warrant and then to rely on "exigencies," all of which were anticipated in advance, to justify a warrantless arrest would significantly undermine Fourth Amendment guarantees. If such a result is to be avoided, this Court must conclude that the failure by the agents to obtain the requisite arrest warrant for Todisco vitiated the entry into Apartment 3C, thereby requiring the suppression of all evidence seized as a result of that entry.

3. A Writ Of Certiorari Should Be Granted To Determine Whether Justice Department Approval For A Wiretap, Issued By Someone Other Than The Current Attorney General And Who Was Never Authorized By The Current Attorney General To Give Such Approval, Satisfies The Requirements Of 18 U.S.C. § 2516(1).

When Congress enacted the wiretap statutes, it was particularly concerned that resort to this extremely intrusive investigative technique be closely supervised and centrally controlled. Consequently, rather than simply authorizing any law enforcement official or even any United States Attorney to initiate such an application on his own, section 2516(1) of the Act provided that only the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, could authorize a wiretap application. According to the legislative history, this provision was designed to centralize the authority to seek a wiretap warrant in a responsible public official subject to the political process so as to insure that such person would formulate a uniform policy as to this sensitive area of law enforcement, and that there would be "lines of responsibility to an identifiable person" in the event that eavesdropping authority was abused. S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Adm. News 2153 at 2185. Strict compliance with this requirement is mandatory; otherwise, the wiretap evidence must be suppressed. *United States* v. *Giordano*, 416 U.S. 505 (1974).

In the present case, the government claimed to have satisfied the requirements of § 2516(1) through letters of authorization provided by Philip Heymann, the Assistant Attorney General for the Criminal Division of the Department of Justice. According to Mr. Heymann's letters of authorization, he relied for his authority to grant such

authorizations on "Order Number 799-78, dated August 15, 1978," which, he claimed, "specially designated me to authorize applications for court orders authorizing the interception of wire or oral communications."

Examination of that order establishes, however, that Mr. Heymann was never properly designated to provide the authorizations for the wiretap applications in this case. Under § 2516(1), it is clearly only the current Attorney General who is empowered either to authorize the wiretaps or designate one of his assistants to do so. Order 799-78 was not issued by Benjamin Civiletti, the Attorney General at the time of the authorizations in this case. Rather, it was issued by Griffin Bell, the former Attorney General, who had resigned that post many months before the authorizations in this case were issued. Since the individual who was Attorney General at the time Mr. Heymann issued the authorizations in this case had never delegated the authority to issue such authorizations to him, Mr. Heymann lacked the authority to properly perform that function.

Moreover, even assuming that a delegation by a former Attorney General could be sufficient to satisfy § 2516(1), Order 799-78 did not constitute a proper delegation of the wiretap authorization power. Section 2516(1) says that the Assistant Attorney General must be "specially designated by the Attorney General" in order properly to exercise this power. Order 799-78 did not authorize any special individual, such as Philip Heymann, to exercise this power, however. Rather, it simply designated any person occupying the position of Assistant Attorney General in Charge of the Criminal Division to perform this function. Delegation to a position, rather than an individual, frustrates the Congressional determination in enacting § 2516(1) to insure close supervision and identifiable persons of responsibility. Consequently, Order

799-78 did not constitute a proper delegation of authority to Mr. Heymann to approve the wiretap applications in this case.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinions of The Court of Appeals for The Second Circuit.

Respectfully submitted,

MICHAEL A. YOUNG
GOLDBERGER, FELDMAN,
DUBIN & YOUNG
Counsel for Petitioner
401 Broadway—Suite 306
New York, N.Y. 10013
(212) 431 - 9380

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1380-1, 1385-6, 1391-2, 1395—September Term, 1980
(Argued May 20, 1981 Decided May 22, 1981)

Docket Nos. 81-1052-1058

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY TODISCO, ANTHONY VALLONE, JOHN CAMPOPIANO, SALVATORE SFERRAZZA, ALFONSE ZAMBUTO, LEONARD BARRACANO, and DAVID D'ANGELO,

Defendants-Appellants.

Before:

MOORE, TIMBERS and MESKILL,

Circuit Judges.

Appeals from judgments of conviction entered in the Southern District of New York, Robert J. Ward, *District Judge*, of violations of the federal narcotics laws.

Affirmed.

BARRY IVAN SLOTNICK, New York, N.Y. (Jay L. T. Breakstone, New York, N.Y., on the brief), *for appellant Todisco.*

MICHAEL YOUNG, New York, N.Y. (Goldberger, Feldman, Dubin & Young, New York, N.Y., on the brief), *for appellant Vallone.*

JULIA HEIT, New York, N.Y. (Edward Panzer, New York, N.Y., on the brief), *for appellant Barracano.*

Opinion

MICHAEL L. SANTANGELO, New York, N.Y., *for appellant Campopiano.*

ANTHONY V. LOMBARDINO, Kew Gardens, N.Y., *for appellant Sferrazza.*

ALBERT A. GAUDELLI, Flushing, N.Y., *for appellant Zambuto.*

STEVEN B. DUKE, New Haven, Conn., *for appellant D'Angelo.*

RICHARD A. MARTIN, Asst. U.S. Atty., New York, N.Y. (John S. Martin, Jr., U.S. Atty., Lawrence F. Ruggiero, Mark F. Pomerantz and Mary Jo White, Asst. U.S. Attys., New York, N.Y., on the brief), *for appellee.*

PER CURIAM:

Appellants were convicted on various counts of a fifteen count indictment which charged them with conspiracy, and the distribution, possession and possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. § 2 (1976). All appellants except D'Angelo pled guilty following the denial of their motions to suppress certain evidence, but preserved their right to appeal from the denial of their pre-trial motions. D'Angelo was convicted following a jury trial. From the judgments of conviction [1]

[1] Appellants were sentenced as follows:
Todisco . . . . Five concurrent 30 year terms; 10 years special parole.
Vallone . . . Two concurrent 20 year terms; 10 years special parole.
Barracano . . Up to 10 years under the Young Adult Offender Act.
Zambuto . . . Two concurrent 7 year terms; 3 years special parole.
Sferrazza . . Two concurrent 10 year terms; 3 years special parole.
Campopiano 15 years.
D'Angelo . . . Three concurrent 10 year terms; 3 years special parole.

entered on February 4, 1981, Robert J. Ward, *District Judge*, all appellants have appealed. For the reasons below, we affirm the convictions of all appellants on all counts.

The indictment followed a four month investigation by 65 agents of the Drug Enforcement Administration (DEA). The investigation concluded on September 3, 1980, at which time a $900,000, 3 kilogram, heroin sale was slated to take place in several installments. The sale had been negotiated between undercover DEA agents and appellants and their associates. To the extent relevant to the issues on appeal, the details of that investigation will be set forth below. For convenience, we shall rule upon the issues raised on appeal by referring to the events before, on and after September 3, 1980.

1. *Events Before September 3, 1980*

We hold that no search warrant was required for the installation of two "pen registers" on appellant Todisco's telephones. *Smith v. Maryland*, 442 U.S. 735 (1979). We are not persuaded by appellant's effort to distinguish the *Smith* case on the ground that the pen register there was installed with the assistance of the telephone company. First, the Court in *Smith* held that the telephone company was acting as an agent of the police for Fourth Amendment purposes. *Id.* at 739, n.4. Moreover, the Court's reasoning—that the installation of a pen register is not a Fourth Amendment search—applies with equal force to this case. In any event, appellants did not move for the suppression of the evidence obtained from the pen register and have not attempted to justify their delay. Their claim, even if it were meritorious, has been waived. *United States v. Rollins*, 522 F.2d 160, 165 (2 Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

There was ample probable cause to support the wiretaps on Todisco's telephone. They were authorized by

Chief Judge Weinstein in the Eastern District of New York on August 7, 1980, and were extended by Judge Nickerson of the same court on August 26, 1980. Aside from the deference properly accorded to the determination by the issuing judge that there was probable cause, *United States v. Perry*, No. 79-1047, slip op. 6749, 6772 (2 Cir. Feb. 9, 1981), we hold, viewing the supporting affidavits as a whole and in a practical and common sense manner, *United States v. Steinberg*, 525 F.2d 1126, 1130 (2 Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), and in light of the ongoing investigation, that there was probable cause. Todisco, a known narcotics dealer, had numerous contacts with individuals who were selling large quantities of heroin to undercover DEA agents. The pen register had disclosed numerous calls to other known narcotics dealers. Todisco also was seen publicly with known dealers. While these contacts, as appellants suggest, are subject to an innocent interpretation when viewed in isolation, in view of the ongoing investigation and the close proximity in time between many of the contacts and the known sales, we hold that there was probable cause to believe that Todisco was involved.

We also hold that the affidavits adequately alleged that normal investigative procedures had been or would be ineffective. The affidavits did disclose the standard investigative techniques which had been employed and the paucity of evidence which had resulted, or could be expected to result, therefrom. *United States v. Vasquez*, 605 F.2d 1269, 1282 (2 Cir.), *cert. denied*, 444 U.S. 981 (1979). Appellants' observation that the language employed in the affidavit in this regard resembled that used in another case is irrelevant, especially since there is no claim that the assertions are untrue or do not apply to the facts herein.

We also held that the application was properly authorized. Order No. 799-78 clearly was adequate to empower

the Assistant Attorney General of the Criminal Division, Philip Heymann, to authorize the application. *In re Weir*, 520 F.2d 662, 667 (9 Cir. 1975). There is no question here, as there was in *United States v. Giordano*, 416 U.S. 505 (1974) (relied upon by appellants), that the Assistant Attorney General did not actually sign the memorandum approving the application. There is no requirement that the authorizing official must recite his reasons for approving a recommended wiretap application. We decline appellants' invitation to hold that the district court erred in refusing to hold a full evidentiary hearing based on appellants' unfounded speculation.

Finally, with respect to the events before September 8, 1980, we hold that the district court's finding of fact that the "August 8, 1980" date on the order authorizing the wiretaps was a ministerial error and therefore insignificant, was not clearly erroneous.

2. *Events on September 3, 1980*

We hold that the warrantless arrest of Todisco in Apartment 3C at 610 Waring Avenue was lawful. There can be no doubt that, under the precedents in this Circuit, the district court did not err in refusing to suppress the "fruits" of that arrest, including the evidence uncovered in the subsequent search of the apartment. *United States v. Campbell*, 581 F.2d 22, 26 (2 Cir. 1979); *United States v. Reed*, 572 F.2d 412, 424 (2 Cir. 1978), *cert. denied*, 439 F.2d 913 (1978). Todisco was known to be engaged in a serious crime at the time of his arrest. One of his cohorts had just been arrested with a gun. And, most compellingly, Todisco was in a position to destroy substantial evidence of his guilt. Appellants' assertions that the DEA agents somehow "manufactured" these events are belied by the facts. The agents had no way of knowing, before the events occurred, that Todisco, at the time of the arrests, would be secreted with a large quantity of heroin waiting for co-appellant Vallone to return. While

an arrest warrant could have been obtained before September 3, we decline, on the fact of this case, to interfere with the discretion accorded narcotics agents to determine when they will make an arrest. *See United States v. Santiago*, 327 F.2d 573 (2d Cir. 1964). That is especially so here, where there simply is no basis for the claims of appellants.

Since the arrest of Todisco, and the entry subsequent to his arrest, were lawful, there is no question that the search of Apartment 3C, pursuant to a warrant issued on September 3, 1980, also was lawful.

Appellants' claims regarding the warrantless arrest of appellant Sferrazza, and the search of the Zambuto residence subsequent to that arrest, also are without merit. Based on the wiretap evidence, and the DEA agents' observations of the meeting between Sferrazza and Todisco on the morning of the September 3 heroin sale, the agents clearly had probable cause to arrest Sferrazza. In the district court Sferrazza unequivocally withdrew his claim that the warrantless arrest in the Zambuto residence somehow violated his Fourth Amendment rights. He also withdrew his claim that evidence seized subsequent to that arrest, and his confession to DEA agents, should be suppressed for that reason.

In view of the claims of other appellants regarding the Sferrazza arrest, however, we hold that, even assuming that a warrant was required to arrest Sferrazza in Zambuto's home absent exigent circumstances, *Steagold v. United States*, 49 U.S.L.W. 4418 (U.S. April 21, 1981), the arrest here nevertheless was proper. In that regard, we hold that Judge Ward's findings of fact, stated on the record on December 4, 1980, that exigent circumstances justifying the warrantless arrest clearly existed under the standards set forth in *United States v. Reed*, *supra*, were not clearly erroneous.

We hold that the evidence seized in the Zambuto home following the Sferrazza arrest was admissible. Mrs. Zambuto's affirmative assistance in the discovery of $300,000 in cash hidden in the Zambuto basement is compelling evidence that she voluntarily consented to the search, *United States v. Rothberg*, 460 F.2d 223 (2 Cir. 1973). The money therefore was admissible. The district court found that Mrs. Zambuto's testimony that she was coerced by the DEA agents to assist in their search was "unbelievable." This finding was based in part on her demeanor and her unresponsive answers to questions on cross-examination. The district court challenged "any who read the record [to] find otherwise." Having carefully read the record, and according deference to the district court's determination of witness credibility, *Alessi v. United States*, 628 F.2d 1133, 1135 (2 Cir. 1980), we hold that the district court's admission of this evidence was proper.

Similarly, we hold that Sferrazza knowingly and intelligently waived his *Miranda* rights before making incriminating statements to the DEA agents. Based on Sferrazza's in-court behavior and the recorded telephone conversations involving him, the district court had an ample basis for discounting appellant's claim that he did not understand English.

We further hold that the execution of the search warrant covering the Zambuto home on the evening of September 3 did not violate anyone's rights under the Fourth Amendment. The district court's finding of fact that the search began before 10 P.M. was not clearly erroneous, in the light of testimony that the agents were notified by telephone that the warrant had been approved by Magistrate Chrein at 9:50 P.M.

The search of Todisco's home, pursuant to a warrant issued on September 3, also was lawful. There is no inconsistency between the September 3 application for

that warrant and the DEA agents' earlier application for a wiretap order for Todisco's telephone. There was no evidence, prior to Todisco's arrest on September 3, that he ever physically possessed heroin. There is no merit in appellants' claim that the agents were required to discuss with the magistrate on September 3 the contents of the earlier, irrelevant, application for a wiretap.

3. *Events After September 3*

We hold that the district court did not abuse its discretion in refusing to grant a continuance after the filing of a superseding indictment on November 25, 1980. First, the Speedy Trial Act, 18 U.S.C. § 3161(c) (1980 Supp.), does not divest the district court of its discretion to grant or refuse a continuance. The district court's inquiry and ruling on the motion for a continuance was consistent with the guidelines promulgated by this Circuit under the Speedy Trial Act. Guidelines Under the Speedy Trial Act, II L, comment, at 31 (January 16, 1979). While those guidelines do not have the force of law, they are entitled to appropriate respect. Appellants' arguments do not convince us that those guidelines are incorrect or inconsistent with the statute, or that 18 U.S.C. § 3161(c) stripped the district court of its discretion under the circumstances of this case.

In view of the fact that the charges in the superseding indictment were substantially the same as those in the original indictment and in view of the fact that substantial discovery had taken place, we hold that the district court did not abuse its discretion in refusing to grant a continuance.

Similarly, the district court did not abuse its discretion in refusing to grant D'Angelo a continuance on the eve of trial to obtain new counsel. The court gave D'Angelo an ample and continuing opportunity to air his complaints about counsel. These amounted to no more than a disagreement about tactics and an unspecified "loss of

confidence." The court had ample opportunity to observe counsel and to note his competence during the months before trial when the same counsel represented D'Angelo, without incident. In addition, the court did its utmost to accommodate D'Angelo's concerns without disrupting the scheduling of this complex jury trial. We repeatedly have expressed our concern that district courts be wary of eleventh hour requests for new counsel. *E.g., United States* v. *Carroll*, 510 F.2d 507, 510 (2 Cir. 1975); *United States* v. *Llanes*, 374 F.2d 712, 717 (2d Cir. 1967). Under the circumstances of this case, we hold that the district court's refusal to grant a continuance was a proper exercise of his discretion.

We also hold that D'Angelo's representation at trial was by no means constitutionally ineffective under this Circuit's standard. *E.g., United States* v. *Bubar*, 567 F.2d 192, 202 (2 Cir. 1977), *cert. denied*, 434 U.S. 872 (1977). We find no merit in the claim that the district court deprived D'Angelo of a fair trial by failing to exclude evidence which appellant's counsel made a conscious, tactical, decision to present

We further hold that there was sufficient evidence to support the jury verdict convicting D'Angelo. First, the court did not err in admitting the hearsay statements of D'Angelo's co-conspirators. There was ample independent evidence of D'Angelo's participation in the conspiracy to permit the admission of these statements. *United States* v. *Geaney*, 417 F.2d 1117 (2 Cir. 1969). The court and jury were free to reject D'Angelo's "innocent" interpretation of the telephone calls and clandestine meetings which D'Angelo had with Todisco and his associates. *United States* v. *Weisman*, 624 F.2d 1118, 1130 (2 Cir. 1980), *cert. denied*, —— U.S. —— (1981). In asking us to accept his innocent gloss on the evidence before the district court, D'Angelo in effect is asking us to view those events

in isolation and to disregard the fact that they occurred during substantial heroin sales to undercover agents. We hold that there was sufficient evidence upon which the jury could find D'Angelo guilty beyond a reasonable doubt.

Finally, we hold that Todisco's claim that his guilty plea was not knowingly and intelligently made is frivolous. Todisco, represented by counsel, engaged in a colloquy with the district court which more than adequately demonstrated that he understood the nature of the charges to which he pled guilty.

All appellants were convicted of serious offenses on the basis of overwhelming evidence of guilt—six by pleading guilty and one after a jury trial. Our careful examination of the record satisfies us that all appellants were accorded a fair hearing, by a conscientious district judge, on their pre-trial motions and, in the case of one appellant, at his jury trial. We affirm the convictions of all appellants on all counts. We order that the mandate issue forthwith.

Affirmed.

Order

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July , one thousand nine hundred and eighty-one.

Docket No. 81-1052 thru 81-1058

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ANTHONY TODISCO, a/k/a Lefty, SAL SFERRAZZA, a/k/a Grandpa, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a Uncle John, a/k/a Echoes, ANTHONY VALLONE, a/k/a Tutti, LENNY BARRACANO, a/k/a the Kid, DAVID D'ANGELO, HECTOR TORRES, a/k/a Picaro, a/k/a Pic, a/k/a Woody, a/k/a Shvartza, LUIS ACOSTA, a/k/a Louis Molina, a/k/a Angel,

Defendants,

ANTHONY TODISCO, a/k/a Lefty, SAL SFERRAZZA, a/k/a Grandpa, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a Uncle John, a/k/a Echoes, ANTHONY VALLONE, a/k/a Tutti, LENNY BARRACANO, a/k/a the Kid, DAVID D'ANGELO,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants Anthony Todisco, Salvatore Sferrazza, Alphonse Zambuto, David D'Angelo, and Anthony Vallone,

Order

Upon consideration by the panel that heard the appeal, it is Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,
Clerk.

By : FRANCIS X. GUIDHART,
Chief Deputy Clerk.